IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.04.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Writ Petition Nos.23387 and 23759 of 2004

1. Hathija R.Rahiman
2. M.Shahul Hameed Bathsha .. Petitioners in W.P.No. 23387 of 2004

S.Mohammed Marzook (Deceased)
by his legal heirs
1. Hathija R.Rahiman
2. M.Shahul Hameed Bathsha .. Petitioner in W.P.No. 23759 of 2004

Vs.

1. The Special Director,
   Government of India Enforcement Directorate,
   6th Floor, Lok Naik Bhavan, Khan Market,
   New Delhi-110 003.

2. The Registrar,
   Appellate Tribunal for Foreign Exchange,
   Ministry of Law, Justice & Company Affairs,
   Janpath Bhawan, 4th Floor, "B" Wing,
   Janpath, New Delhi-110 001.

3. The Deputy Director,
   Directorate of Enforcement,
   Shastri Bhavan, III Floor,
   III Block, No.26, Haddows Road,
   Chennai-600 006. .. Respondents in both the W.Ps.

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W.P.No.23387 of 2004:

Writ Petition filed under Article 226 of the Constitution, praying for the issuance of Writ of Certiorarified Mandamus calling for the records in connection with the order of the 2nd respondent dated 07.05.2004 in Appeal No.531 of 1993 and quash the same as far as both the petitioners are concerned and further direct the 2nd respondent to take up and dispose off the Appeal No.531 of 1993 on its file on merits.

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W.P.No.23759 of 2004:

Writ Petition filed under Article 226 of the Constitution, praying for the issuance of Writ of Certiorarified Mandamus calling for the records in connection with the order of the 2nd respondent dated 16.07.2004 in Appeal No.531 of 1993 and quash the same and further direct the 2nd respondent to take up and dispose off the Appeal No.531 of 1993 on its file on merits.

For Petitioners : Mr.S.Sathish Rajan in both WPs.

For Respondents : Mr.C.Krishnan, SCGSC in both WPs.

O R D E R

By consent of both the parties, the main writ petitions are taken up for disposal.

2. These writ petitions are filed to call for the records in connection with the orders of the second respondent dated 07.05.2004 and 16.07.2004 respectively, in Appeal No.531 of 1993 and quash the same in so far as the petitioners are concerned and further direct the second respondent to take up and dispose off the Appeal No.531 of 1993 on its file on merits.

3. The brief facts arising out of these writ petitions are as under:-

The petitioners are the legal heirs of one S.Mohamed Marzook, who died on 21.01.2001. The deceased was subjected to investigation, arrest and further proceedings under the Foreign Exchange Regulation Act 1973 ("Act" in short) in connection with the seizure of Indian Currency. The said deceased committed an offence in contravention of Section 9(1)(b) of the Act, to the tune of Rs.4,01,42,000/- during the years 1988 and 1990. It was also alleged that there was violation of provision of Section 9(1)(b) to the extent of seized currencies amounting to Rs.79,99,700/-. There were also further charges under Section 27 of the Act. Later, the deceased was arrested and released on bail on 26.03.1990. The deceased explained to the authorities by letter dated 30.03.1990 stating that the seized amount belonged to him and the same was brought to Madras for purchase of property and the seized amount was not the proceeds of any transaction in violation of the provisions of the Act. Later, Show Cause Notice was issued on 07.03.1991 by the Special Director, the above mentioned first respondent, calling upon the deceased as to why the adjudication proceedings should not be completed u/s 51 of the Act for the aforesaid charges. The said Show Cause Notice also proposed for imposition of penalty u/s 50 of the Act, besides confiscation of the seized amount in terms of Section 63 of the Act. The matter was taken up for adjudication on 21.08.1991 and the petitioners also objected the same. The first respondent passed an order dated 15.07.1993 confiscating the currencies

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seized u/s 9(1)(b) read with 64(2) of the Act. Further, penalties totalling to Rs.2 Crores was imposed and also levied a sum of Rs.5,000/- u/s 8(1) of the Act. Aggrieved by the order, an appeal was preferred to the Appellate Tribunal, the above mentioned second respondent, u/s 52 of the Act. The appeal was dismissed by the Appellate Tribunal by order dated 07.05.2004, on the ground that there was no representation on behalf of the petitioners as well as there was no cooperation by the petitioners. Subsequently, the petitioners filed a miscellaneous petition for setting aside the exparte order. The said miscellaneous petition was also dismissed by the Appellate Tribunal by its order dated 16.07.2004. Aggrieved by the same, the present writ petitions are filed.

4. Learned counsel appearing for the petitioners submitted that the impugned orders passed by the Single Member are wrong and illegal on the ground that the Single Member has no jurisdiction to hear the Appeal wherein the penalty amount involved is more than Rs.5 lakhs. He further submitted that, in this case, the amount involved is more than Rs.2 Crores and hence a Division Bench alone has the jurisdiction to consider the appeal and pass orders and relied on the Notification S.O.320(E), dated 04.04.2001 issued u/s 20 of the Foreign Exchange Management Act, 1999 ("FEMA" in short) to support his contention. Further it is contended that the second respondent ought to have set aside the exparte order and also there is no proper opportunity given to the petitioners before disposing of the appeal.

5. Learned Senior Standing Counsel appearing for the respondents submitted that the second respondent has only dismissed the appeal for non-prosecution and hence the Single Member has jurisdiction to consider the matter. He also submitted that the Notification relied on by the petitioners are not applicable to the case. Further it is contended that enough opportunity have been given to the petitioners and hence the dismissal of the appeal for default as well as dismissal of the setting aside petition are in accordance with law.

6. Heard the counsel. The Appellate Tribunal dismissed the appeal for default by its order dated 07.05.2004, wherein it was held as follows:-

> "The appeal memorandum is not amended by the counsel as directed on 29.4.04. The legal heirs appear to stage hide and seek game in the matter where the penalty involved is Rs.2,00,05,000/-. From the conduct of the parties it appears that legal heirs of the deceased appellant are attempting to avoid speedy disposal of the proceedings and to cause undue delay in disposal of the matter though heavy penalty amount is involved in the case. The appeal is dismissed for default of the legal heirs to pursue with the proceedings."

It is clear from the above that the amount involved in the appeal is more than Rs.2 Crores. Penalty Appeals involving amount of more than Rs.5 lakhs

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are placed normally before a Bench. In this case, the appeal was considered only by a Single Member. The said Single Member has no jurisdiction to consider the same. There is a Notification S.O.320(E) dated 04.04.2001 issued u/s 20 of FEMA, which reads as under:-

> "S.O.320(E), dated 4-4-2001 - In exercise of the powers conferred by clause (b) of sub-section (2) of section 20 and section 29 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Chairperson hereby constitutes the following Benches of the Appellate Tribunal, namely:-
>
> (a) Two single Member Benches one consisting of the Chairperson and the other consisting of a Member, and
>
> (b) One division Bench consisting of the Chairperson and the Member.
>
> 2. The division Bench referred to in clause (b) above, shall hear such cases in which the amount of penalty exceeds rupees five lakhs and all other cases shall be heard by a single Member Bench. The distribution of work amongst Benches shall be done by the Chairperson, from time to time."

From a reading of the above, it is clear that only a Division Bench as referred in the Notification has exclusive jurisdiction to hear the penalty appeal in which the amount involved exceeds Rs.5 lakhs. In all other cases, the appeals are heard by a Single Member only. A Division Bench ought to have heard the matter and hence hearing of the penalty appeal by the Single Member is against the procedure contemplated in the above Notification and it amounts to procedural irregularity. It is also further stated by the counsel appearing for the petitioners that the said Notification is still in force and the same has not been withdrawn till date. Learned Senior Standing Counsel appearing for the respondents also has not disputed the same.

7. In view of the above Notification and in the interest of justice, the impugned order dated 07.05.2004 in W.P.No.23387 of 2004 passed by the second respondent is set aside with a direction to the Appellate Tribunal to take up the appeal on file and rehear the same by a Division Bench as per the above Notification and pass orders in accordance with law, as expeditiously as possible, after giving proper opportunity to the petitioners. It is also further made clear that the petitioners are directed to extend full cooperation and also shall not cause any undue delay before the Appellate Tribunal in disposing of the appeal. In view of the setting aside of the impugned order dated 07.05.2004, no order need be passed in W.P.No.23759 of 2004 as it is only consequential in nature.

8. With the above observation, the writ petitions are disposed of.

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Consequently, W.P.M.P.Nos.28331 of 2004, 28807 of 2004, 1193 of 2007 and 1194 of 2007 are closed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To
1. The Special Director,
   Government of India Enforcement Directorate,
   6th Floor, Lok Naik Bhavan, Khan Market,
   New Delhi-110 003.

2. The Registrar,
   Appellate Tribunal for Foreign Exchange,
   Ministry of Law, Justice & Company Affairs,
   Janpath Bhawan, 4th Floor, "B" Wing,
   Janpath, New Delhi-110 001.

3. The Deputy Director,
   Directorate of Enforcement,
   Shastri Bhavan, III Floor,
   III Block, No.26, Haddows Road,
   Chennai-600 006.

+ 2 CCs to Mr.C.Krishnan, Advocate SR NO 29473

+ 2 CCs to Mr.S.Sathish Rajan, Advocate SR NO 29476, 29475

W.P.Nos.23387 and 23759 of 2004

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